Filed 8/13/19 In re A.T. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re A.T., a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. ALFRED T. et al., Defendants and Appellants.	F078745 (Super. Ct. No. 517702) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Paul A. Swiller, under appointment by the Court of Appeal, for Defendant and Appellant, Alfred T.

Jessica M. Ronco, under appointment by the Court of Appeal, for Defendant and Appellant, A.W.

Thomas E. Boze, County Counsel, and Maria Elena R. Ratliff, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Smith, Acting P.J., Meehan, J. and DeSantos, J.

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INTRODUCTION

Appellants A.W. (mother) and Alfred T. (father) contend the juvenile court erred in terminating their parental rights and placing their child, A.T. (minor), for adoption at the Welfare and Institutions Code[1] section 366.26 hearing. Specifically, they contend the juvenile court's determination that the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply is not supported by substantial evidence. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

"Because compliance with the ICWA is the only issue raised in this appeal, our discussion of the facts and procedural background focuses on the facts relevant to compliance with the ICWA." (*In re L.B.* (2015) 239 Cal.App.4th 367, 370.)

A section 300 petition was filed on behalf of the minor and the minor's teenaged half-sister, G.D.,[2] on September 14, 2016. Attached to the petition was form ICWA-010(A) indicating that the minor may have Indian ancestry. On September 15, 2016, the juvenile court ordered that the minor be detained.

On September 15, 2016, mother and father each signed and filed form ICWA-020, "Parental Notification of Indian Status." Mother's form stated that she may have Cherokee ancestry. Father's form indicated he may have Indian ancestry but did not specify any tribe.

At the detention hearing held on September 15, 2016, the juvenile court queried both parents on whether they had any additional information that would assist in establishing Indian ancestry. Father indicated he thought he had Indian ancestry through his mother's family but did not know the tribe and stated there was no family he could

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[1] References to code sections are to the Welfare and Institutions Code unless otherwise specified.

[2] G.D. is not a subject of this appeal and we dispense with further references to her in the facts.

ask for further information. Mother believed she may have Cherokee ancestry. The juvenile court found that the ICWA may apply.

On September 23, 2016, the Stanislaus County Community Services Agency (agency) filed form ICWA-030, "Notice of Child Custody Proceeding for Indian Child." The notice included the full names and addresses for mother and father; the full names of the minor's maternal and paternal grandparents; and stated the names of the paternal and maternal great-grandparents of the minor were unknown. The notice was served on the Bureau of Indian Affairs (BIA), Secretary of the Interior (Secretary), the Eastern Band of Cherokee Indians, Cherokee Nation of Oklahoma, and United Keetoowah Band of Cherokee.

In a letter dated September 30, 2016, the United Keetoowah Band of Cherokee Indians reported there was no evidence the minor was descended from anyone on the Keetoowah Roll. In a letter dated October 10, 2016, the Eastern Band of Cherokee Indians stated the minor was not registered or eligible to register as a member of the tribe.

The Cherokee Nation sent a letter to the agency, dated October 12, 2016, stating the information in the ICWA-030 form was incomplete and requesting dates of birth for maternal and paternal grandparents and middle names of two grandparents.

On October 13, 2016, the agency filed proof of receipt of the notice by the BIA, Secretary, and the three Cherokee tribes. The signed green card from the certified mailing to the Secretary was filed with the juvenile court on October 20, 2016.

At the October 26, 2016 jurisdiction and disposition hearing, the minor was removed from parental custody and placed in foster care. Reunification services were ordered provided to both mother and father. A case plan was adopted.

The agency conducted a due diligence search for any relatives of mother. By letter dated January 10, 2017, the agency responded to the Cherokee Nation's October 12, 2016, letter requesting further information. The agency's letter stated that "the information provided to you is the most complete information that we can acquire at this

time. A diligent search was completed to find as much information as possible with this family."

The Cherokee nation replied to the agency's letter with a letter dated March 7, 2017, stating the information "remains incomplete and it is impossible to validate or invalidate Cherokee tribal *eligibility* without more information" on the maternal grandfather. The letter concluded that "[a]t this time, the child is … NOT an 'Indian Child' in relation to the Cherokee nation."

On March 8, 2017, the agency filed a motion seeking a determination that ICWA did not apply to the proceedings. Attached to the motion were the responses from the tribes to the ICWA notices, including all the letters between the Cherokee Nation and the agency. The juvenile court signed an order finding that ICWA did not apply to the proceedings on March 9, 2017.

At the April 19, 2017 six-month review hearing, the juvenile court continued services to both parents for an additional six months and scheduled a 12-month review hearing.

On August 29, 2017, the agency filed a section 388 petition seeking to have visits supervised, rather than monitored. At a hearing on September 14, 2017, the section 388 petition was granted.

The report for the 12-month review hearing recommended termination of reunification services, the setting of a section 366.26 hearing, and a plan of adoption for the minor. Mother's participation and progress continued to decline; she either tested positive for substances or failed to show for drug tests. Father participated in services but showed no improvement in interaction with the minor or understanding of the issues that resulted in the filing of the section 300 petition. When a social worker went to the parent's home on January 16, 2018, unknown people were sleeping on the couches; mother was in jail as a result of a domestic violence incident the night before; and the home was filthy and had cockroaches.

Services were terminated for both parents on January 23, 2018. A plan of long-term foster care was established for the minor.

In the July 19, 2018 status review report filed by the agency, it was reported that the minor had expressed a "desire to be permanently placed" with her foster family and adopted by them; the foster family also expressed a desire to have the minor as a permanent member of their family. The minor was "happy" and "doing great" in the placement with the foster family. The minor understood that adoption would result in a loss of contact with her biological family, but "is willing to make that sacrifice to have a forever family."

On July 20, 2018, the agency filed a section 388 petition to change the minor's permanent plan to adoption. The petition was granted on August 20, 2018, and a section 366.26 hearing was set for December 18, 2018.

The section 366.26 report recommended termination of parental rights. The foster family with whom the minor had been placed wished to adopt her. A CASA report filed for the section 366.26 hearing recommended a permanent plan of adoption by the minor's current foster family.

At a hearing on December 18, 2018, the juvenile court terminated the parental rights of both mother and father and ordered a permanent plan of adoption for the minor.

Father and mother both appealed from the order terminating parental rights and setting a permanent plan of adoption.

DISCUSSION

Both mother and father contend that the ICWA-030 notice was incomplete and therefore, ICWA notice was inadequate.

Standard of Review

Where, as here, the juvenile court has made a finding the ICWA is inapplicable, the finding is reviewed under the substantial evidence standard. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430; *In re Karla C.* (2003) 113 Cal.App.4th 166, 178–179.)

Thus, we must uphold the court's orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we must indulge all legitimate inferences in favor of affirmance. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.) A juvenile court's ICWA finding is also subject to harmless error analysis. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.)

ICWA Notice Requirements

A parent can raise the issue of ICWA compliance at any stage of the proceedings, including in an appeal after termination of parental rights. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 14.) Consequently, although both mother and father failed to raise any challenge to the ICWA notice in the juvenile court, they have not forfeited their right to challenge the ICWA compliance.

Congress enacted the ICWA to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and the placement of such children in foster or adoptive homes that will reflect the unique values of Indian culture. (*In re C.Y.* (2012) 208 Cal.App.4th 34, 39; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195.) An " 'Indian child' is defined as a child who is either (1) 'a member of an Indian tribe' or (2) 'eligible for membership in an Indian tribe and … the biological child of a member of an Indian tribe ….' (25 U.S.C. § 1903(4).)" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338.) The ICWA applies only to federally recognized tribes. (25 U.S.C. § 1903(8); *In re Jonathon S.*, *supra*, at p. 338; *In re B.R.* (2009) 176 Cal.App.4th 773, 783; *In re Wanomi P.* (1989) 216 Cal.App.3d 156, 166-168.)

In state court proceedings involving the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe have the right to intervene at any point in the proceeding. (25 U.S.C. § 1911(c).) But this right is meaningless unless the tribe is notified of the proceedings. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1466.) Notice serves the dual purpose of (1) enabling

the tribe to investigate and determine whether a child is an Indian child, and (2) advising the tribe of the pending proceeding and its right to intervene. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.)

In every dependency proceeding, the department and the juvenile court have an "affirmative and continuing duty to inquire whether a child … is or may be an Indian child …." (§ 224.3, subd. (a); see Cal. Rules of Court,[3] rule 5.481(a); *In re W.B.* (2012) 55 Cal.4th 30, 53; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165. (*Gabriel G.*).) Once the court or department "knows or has reason to know that an Indian child is involved, the social worker … is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable …." (Rule 5.481(a)(4); § 224.3, subd. (c); *Gabriel G.*, *supra*, at p. 1165.)

Because the ICWA was enacted by Congress with the intent to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902), the juvenile court and the department had an affirmative and continuing duty at the outset of the proceedings to inquire whether a child who is subject to the proceedings is, or may be, an Indian child. (*In re A.B.* (2008) 164 Cal.App.4th 832, 838–839; see § 224.3, subd. (a); see also rule 5.481(a).) The department or agency must include in the notice all known names of the Indian child's "biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known." (§ 224.3, subd. (a)(5)(C); see rule 5.481(a)(4)(A) and Judicial Council form ICWA-030.)

A social worker who "knows or has reason to know that an Indian child is … involved … must make further inquiry" regarding the possible Indian status of the child,

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3 References to rules are to the California Rules of Court.

"as soon as practicable, by: [¶] (A) [i]nterviewing the parents, Indian custodian, and 'extended family members'… to gather the information listed in Welfare and Institutions Code section 224.2[, subdivision(a)(5)]." (Rule 5.481(a)(4); *Gabriel G., supra*, 206 Cal.App.4th at p. 1165.) "[I]f the court [or] social worker … subsequently receive[] any information required under paragraph (5) of subdivision (a) of Section 224.2 that was not previously available or included in the notice issued under Section 224.2, the social worker … shall provide the additional information to any tribes entitled to notice under paragraph (3) of subdivision (a) of Section 224.2 and the Bureau of Indian Affairs." (Former § 224.3, subd. (f), as amended Stats. 2018, ch. 833 § 7.)

ICWA Notice and Duty to Inquire

"The ICWA establishes minimum federal standards, both procedural and substantive, governing the removal of Indian children from their families." (*In re H.A.* (2002) 103 Cal.App.4th 1206, 1210.)

> "Among the procedural safeguards included in the ICWA is a provision for notice, which states in part: 'In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.' (25 U.S.C. § 1912(a).)" (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1453–1454.)

In *H.A.*, we specified what we expected the agency to do to satisfy the notice provisions of the ICWA and to provide a proper record for the juvenile court and appellate courts: the social services agency must send proper notice, return receipt requested, to the Indian tribe(s) in which the Indian child is enrolled or may be eligible for enrollment, and provide the juvenile court a copy of the notice sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the child's status. (*In re H.A., supra,* 103 Cal.App.4th at pp. 1454–1455.) "In response to

the notice requirements, the state Judicial Council has generated the notice forms used by the [agency] here: ICWA-030, entitled 'Notice of Child Custody Proceeding for Indian Child.' " (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1530 (*I.W.*).)

Notice under the ICWA must contain sufficient evidence to constitute meaningful notice. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) "The federal regulations require the ICWA notice to include, *if known*, '(1) the name, birthplace, and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great-grandparents and other identifying information; and (4) a copy of the dependency petition.' California courts enforce these requirements." (*I.W.*, *supra*, 180 Cal.App.4th at p. 1529, italics added.) The juvenile court must determine whether proper notice was given under the ICWA and whether the ICWA applies to the proceedings. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 506.)

Section 224.3 and rule 5.481(a) impose upon both the juvenile court and the agency "an affirmative and continuing duty to inquire" whether a dependent child is or may be an Indian child. (See *In re W.B.* (2012) 55 Cal.4th 30, 53.) The social worker must ask the child, if the child is old enough, and the parents, if the child has Indian heritage. (Rule 5.481(a)(1).) Upon a parent's first appearance in a dependency proceeding, the juvenile court must order the parent to complete a form ICWA-020. (Rule 5.481(a)(2).) "If the parent, Indian custodian, or guardian does not appear at the first hearing, or is unavailable at the initiation of a proceeding, the court must order the person or entity that has the inquiry duty under this rule to use reasonable diligence to find and inform the parent, Indian custodian, or guardian that the court has ordered the parent, Indian custodian, or guardian to complete … form (ICWA-020)." (Rule 5.481(a)(3).) Here, both mother and father completed form ICWA-020.

The agency and the juvenile court have an "affirmative and continuing duty to inquire whether a child … is or may be an Indian child.…" (§ 224.2, subd. (a);

rule 5.481(a); *Gabriel G., supra,* 206 Cal.App.4th at p. 1165; *In re W.B., supra*, 55 Cal.4th at p. 53.) Once the court or agency "knows or has reason to know that an Indian child is involved, the social worker … is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable …." (*Gabriel G., supra,* at p. 1165; rule 5.481(a)(4).) The agency's duty of "further inquiry" requires " 'interviewing the parents, Indian custodian, and extended family members …, contacting the Bureau of Indian Affairs … [and contacting] the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.' " (*Gabriel G., supra*, at p. 1165; rule 5.481(a)(4).)

Both parents were questioned by the agency on September 14, 2016, regarding ICWA. The record shows that when questioned by the court, father could provide no further information and indicated no relatives could provide any additional information. With respect to mother's family, a due diligence search was conducted by the agency, which included a search of online family trees, birth certificates, and marriage certificates. Clearly, the agency made inquiries and obtained more information than was provided by mother or father in the form ICWA-020 because that additional information was included in the form ICWA-030 prepared by the agency. There is no indication in the record that the agency failed to include in the ICWA-030 information known to it after making inquiries.

In *In re D.T., supra*, 113 Cal.App.4th 1449, the court held that notices that failed to include more than the names, birth dates, and birthplaces of the minors and their parents, both of whom had Indian lineage, were insufficient to permit the BIA and the tribes to determine whether the minors were Indian children because the incomplete notices failed to include information known to the social worker and contained in the disposition report. (*Id.* at p. 1455.) The key is that the agency is required to provide all *known* information, after making an inquiry. (*I.W., supra*, 180 Cal.App.4th at p. 1529.) Neither mother nor father assert that the agency omitted information in its possession.

Mother and father contend, however, the agency should have made further inquiry. There are limits to the investigatory burden placed on the agency. "Neither the [ICWA] nor the various rules, regulations, and case law interpreting it require [the agency] or the juvenile court to cast about, attempting to learn the names of possible tribal units to which to send notices, or to make further inquiry with BIA." (*In re Levi U.* (2000) 78 Cal.App.4th 191, 199.) Similarly, no provision imposes a duty to "cast about" for additional family history that cannot be obtained by reasonable efforts on the part of the agency.

To delay the proceedings, or conditionally reverse and remand for further notice, would not serve the purpose of the ICWA. The BIA and Secretary were served with the ICWA-030 notice in this case and did not respond. The Cherokee tribes all responded that based upon available information, the minor was not enrolled in or eligible for enrollment in the tribe.

Neither mother nor father have provided any additional information that might be relevant to an ICWA inquiry, nor have they produced any evidence that further inquiry on the part of the agency would be fruitful. Rather, mother and father assume, without any basis in the record, that some further inquiry of relatives of the minor would produce additional information relevant to ICWA. Mother's and father's assumption, without any basis in the record, that some further inquiry of relatives could have supplied missing information relevant for ICWA, is insufficient to establish that the agency's ICWA inquiry was inadequate. (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 994–995.)

Notice is sufficient if there was substantial compliance with ICWA. (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566.) The agency substantially complied with ICWA and there is no basis for reversal.

DISPOSITION

The order terminating mother's and father's parental rights to the minor and placing the minor for adoption is affirmed.